United States Court of Appeals

for the Second Circuit

APPELLANT'S SUPPLEMENTAL APPENDIX

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75-2088

To be argued by
EDWARD S. RUDOFSKY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Appeal No. 75-2088

MEIR KAHANE,
Plaintiff-Petitioner-Appellee,

—against—

NORMAN CARLSON Director of the Federal Bureau of Prisons, LAWRENCE TAYLOR, Warden of the New York Metropolitan Correctional Center, and MATTHEW WALSH, Director of the New York Community Treatment Center,
Defendants-Respondents-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S SUPPLEMENTAL BRIEF AND APPENDIX

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Preliminary Statement

This is an appeal by appellants Norman Carlson, Lawrence Taylor and Matthew Walsh, in their respective capacities as officials of the Federal Bureau of Prisons, from a final order of the United States District Court for the Eastern District of New York (Weinstein, J.) entered on August 21, 1975 following the remand of this cause [1/] to the district court by a panel of this Court on August 12, 1975 with the direction that the district court's order of May 7, 1975 (then the subject of this appeal) be reconsidered in light of this Court's intervening decision in United States v. Huss and Similow, _____ F.2d _____, Slip. Op. 5121 (July 25, 1975). On remand the district court substituted appellants for the previous defendant below (the United States of America), permitted the pleadings to be amended in certain respects, and reaffirmed its prior order on the merits. On consent, this appeal was then restored to the calendar of the Court.

1/ Then captioned Kahane v. United States.

SUPPLEMENTARY ISSUE PRESENTED ON APPEAL */

Whether the district court properly assumed jurisdiction over appellee's claims pursuant to 28 U.S.C. §§1361 and 2241.

STATEMENT OF THE CASE */

Following the entry of the order of this Court dated August 12, 1975 remanding the subject controversy to the district court for reconsideration in light of the decision in Huss and Smilow, supra, appellee (plaintiff-petitioner below), on August 14, 1975, filed a complaint in the district court seeking a writ of mandamus against Norman Carlson and Matthew Walsh. (SA 26).

Later that same day, the district court held a hearing "in 75 C 624" (SA 5), during which it "suggested" that appellee make a series of motions adding certain defendants (including appellants herein) 2/ and amending the pleadings

*/ As indicated in the preliminary statement above, this appeal was previously before the Court. In connection therewith, the Government prepared a brief on the merits and filed the same with the Court. We respectfully call the Court's attention to pages 2-7 and 11-26 of that brief which contain, respectively, the statement of the case prior to remand and our argument on the merits of appellee's constitutional claim.

2/ The court below also initially "suggested" that the United States Attorney for the Eastern District of New York be made a defendant herein, and granted a motion to this effect over the objection of the Government (SA 5-6); the court later reversed itself sua sponte, however, and the Order On Remand names only appellants as defendants-respondents below (SA 42).

to include claims pursuant to 28 U.S.C. §§1361 and 2241. The court below then granted these motions over the objection of the Government [3/] (SA 4-8).

When advised that appellee had commenced an independent mandamus action (SA 26-27), and presented with a petition by appellee for a writ of habeas corpus [4/] (SA 28-32), the district court deemed the pleadings in 75 C 624 amended to include all of the claims in the mandamus complaint and habeas corpus petition and then dismissed both the complaint and petition as unnecessarily duplicative of 75 C 624 (SA 17-18).

On August 21, 1975, following a second hearing (SA 33-39), the district court entered its Order On Remand giving effect to the foregoing rulings and reaffirming its May 7, 1975 decision and order on the merits (SA 40-46).

3/ The government flatly objected to the assertion of jurisdiction over the §2241 claim (SA 7). With respect to the §1361 claim, the government initially conceded jurisdiction on the assumption that venue was proper under 28 U.S.C. §1391(e)(4) (SA 11) and moved the court for a transfer of the cause to another district in the interests of justice (SA 11-15); this motion was denied (SA 15-16). The venue concession was later withdrawn by permission of the district court (SA 24-25) and the Order On Remand entered over our objection vis-a-vis the §1361 claim (SA 43).

4/ Ultimately docketed in the district court as 75 C 1343.

ARGUMENT

THE DISTRICT COURT ERRED IN ASSUMING JURISDICTION OVER APPELLEE'S CLAIMS PURSUANT TO 28 U.S.C. §§1361 AND §2241

I. 28 U.S.C. §1361

In its decision in Huss and Smilow, supra, Slip Op. at 5133, this Court explained that

> §1361 affords a district court with proper venue the jurisdiction to consider a claim that actions of federal prison officials violate first amendment rights. [Emphasis added.]

Accordingly, it remains to be seen whether the court below had "proper venue" with respect to the instant action.

Venue analysis with respect to §1361 revolves, of course, around 28 U.S.C. §1391(e). See, e.g., Huss and Smilow, supra, Slip Op. at 5132-5133. That provision states (in pertinent part):

> (e) A civil action in which each defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, may, except as otherwise provided by law[5/], be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, a (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. [Footnote added.]

5/ E.g., 28 U.S.C. §2241.

Since the record is barren with respect to the personal residences of the appellants (compare Huss and Smilow at Slip Op. 5133) and their official addresses are either in Washington, D.C. (appellant Carlson) or the Southern District of New York (appellants Taylor and Walsh), it appears plain that §1391(e)(1) does not provide a basis for laying venue in the court below. Similarly, since the action does not involve real property, subsection (e)(3) is equally inapposite to the issue before the Court. (We note that neither appellee nor the court below relied on either subsection (e)(1) or (e)(3) throughout.)

Thus, it is clear that for venue in the Eastern District of New York to be "proper venue" for the purposes of establishing §1361 jurisdiction in that court, the requirements of either or both subsections (e)(2) or (e)(4) of §1391, supra, must be satisfied. We submit that neither is the case.

A. §1391(e)(2)

Appellee's claim herein appears to be that when he is transferred to the federal prison facility at Allenwood, Pennsylvania, he will not receive a sufficient variety of kosher food, in violation of his First Amendment rights. He does not claim that the trial held or the sentence imposed in the Eastern District of New York in any way in and of themselves infringed upon his rights, but only that they set in motion the criminal justice processes whereby he will ultimately be incarcerated under conditions he believes to be unconstitutional.

The court below viewed this as a claim that the cause of action arose in the Eastern District of New York, stating (SA 15-16):

> All the major events in the case occurred in the Eastern District of New York.

While we do not in the main quarrel with this assertion, it is clear that almost all of the "major events" in the case (i.e., indictment, conviction, sentencing, probation violation hearing, §2255 petition and hearings) in no way gave rise to the cause of action asserted below; futhermore, the courts have long recognized the distinction between challenges to trial and sentencing, on the one hand, and conditions of incarceration on the other. See, e.g., Huss and Smilow, supra, at 5128-29. To hold that a cause of action such as that asserted herein arises in the sentencing district would only serve to eliminate that

distinction and enable convicted offenders to bring such suits as that at bar in the sentencing district rather than the district of incarceration.

We also note, with respect to the question of where the cause of action asserted herein arises, that, faced with the same constitutional claim, the Huss and Smilow court did not find any facts in the record in that case which would establish venue in the Southern District of New York, although it was a matter of record that the appellants therein were originally convicted in the Southern District. Compare Slip Op. at 5133 with Slip Op. at 5122-23.

In the instant case, subsection (e)(2) venue may well exist in the District of Columbia, where the Bureau of Prisons headquarters is located, or in the Middle District of Pennsylvania, where the allegedly unconstitutional execution of sentence is to take place, or in the Southern District of New York, where appellee is actually confined. In any event, under no view of the facts can it fairly be said that appellee's cause of action (such as it may be) arose in the Eastern District of New York. Accordingly, we contend that §1391(e)(2) is not a predicate for "proper venue" in this action.

B. §1391(e)(4)

For the purposes of §1391, a convicted offender's "residence" is his domicile immediately prior to incarceration. See McCune v. United States, 374 F.Supp. 946 (S.D.N.Y. 1974) and cases and authorities cited therein at 948.

In the case at hand, it is clear that appellee had established his domicile in Israel prior to his incarceration and, therefore, could not possibly predicate venue on §1391(e)(4).

Appellee refused to recognize the importance of domicile below, arguing "the statute specifically says 'residence', not domicile" and that appellee "did in fact reside in the Eastern District of New York prior to his original sentencing . . ." (SA 37). This is clearly the incorrect view; McCune, supra.

The court below, for its part, completely avoided the issue of "domicile", stating (SA 25):

> This [i.e., Brooklyn] was his [i.e., appellee's] last place of residence in this country. All his roots were here - - he was brought up in Brooklyn and lived here as an adult. In addition he was on probation, subject to the probation service quartered in Brooklyn, and this court's supervision, even while he was abroad. He was in Israel only because this court permitted him to be there. Upon his return, he had to report for supervision and justification of his conduct abroad to this court, in Brooklyn.

While the court below accurately states these facts, it attempts no domicile analysis. Clearly, this is because appellee's personal circumstances cannot survive such scrutiny: appellee had moved his entire family to Israel after his 1971 conviction in the court below (A. 161), and it is a matter of public knowledge that he was a candidate for the Israeli parliament before returning to this country; his family remains in Israel to this date (A. 163) and the record reveals no known residence of appellee in this country. Thus, while he may have been a domiciliary of the Eastern District of New York at one time in his life, he clearly and obviously abandoned that domicile and established a new and permanent home for himself and his family out of the district prior to his incarceration and the commencement of the instant suit.[6/]

6/ The fact that appellee has no domicile in this country does not, of course, make it impossible for him to bring a suit such as that at bar. It simply means that his suit must be brought in a district "with proper venue" pursuant to 28 U.S.C. §1391(e)(1) or (e)(2).

C. Summary

Appellee's cause of action did not arise in the district below and he was not a domicile of that district immediately before incarceration. Accordingly, venue does not lie in the court below pursuant to 28 U.S.C. §1391 and, therefore, the court below could not properly exercise §1361 mandamus jurisdiction in this action.

II. 28 U.S.C. §2241

Under the decision of the Supreme Court in Braden v. Judicial Circuit, 410 U.S. 484 (1973), it is clear that a habeas corpus petitioner no longer need be confined in the district in which the petition is filed to invest that court with jurisdiction; it is sufficient if the court petitioned can exercise personal jurisdiction over the custodian of the petitioner. 410 U.S. at 495.

The analysis of habeas corpus jurisdiction in the instant case (where it is undisputed that appellee was and is confined in the Southern District of New York) must thus turn on the question of whether appellee's custodian was personally subject to the jurisdiction of the court below.

Appellant Matthew Walsh, appellee's actual custodian, resides in Westfield, New Jersey; he maintains his official office in the Southern District of New York. Appellant Lawrence Taylor, Mr. Walsh's supervisor, likewise resides in New Jersey and maintains his office in the Southern District of New York. Appellant Norman Carlson, Mr. Taylor's supervisor, lives in Virginia and maintains his office in the District of Columbia. Clearly, none of the appellants (and no actual or potential custodian of appellee) is personally subject to the jurisdiction of the United States District Court for the Eastern District of New York for the purposes of Braden, supra.

Equally clearly, the extra-territorial service of process provided by the second paragraph of §1391(e) [7/] is not applicable to a habeas corpus proceeding. Schlanger v. Seamans, 401 U.S. 487, 490 n.4 (1971), reh. denied, 402 U.S. 990 (1971).

Accordingly, it is respectfully submitted that the court below erred in assuming jurisdiction over appellee's §2241 claim.

7/ There was no actual service of process either within or without the Eastern District of New York on any of the appellants.

8/ The Court in Braden, supra, was aware of and relied upon the Schlanger decision. 410 U.S. at 500.

CONCLUSION

WHEREFORE, for all of the reasons hereinbefore stated, as well as for all of the reasons stated in the main brief previously filed herein by appellants, and upon the record below, the order appealed from should be reversed.

Dated: September 19, 1975

DAVID G. TRAGER
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Eastern District of New York
Attorney for Appellants

PAUL B. BERGMAN
EDWARD S. RUDOFSKY
Assistant United States Attorneys
(Of Counsel)

SUPPLEMENTAL APPENDIX

SA 1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

KAHANE, :

Plaintiff, :

-against- : 75-C-624

UNITED STATES OF AMERICA, :

Defendant. :

----------x

United States Courthouse
Brooklyn, New York

August 14, 1975
3:30 o'clock p.m.

B e f o r e :

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

HENRI LEGENDRE
ACTING OFFICIAL COURT REPORTER

Appearances:

BARRY SLOTNICK, ESQ.
Attorney for Plaintiff

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: EDWARD S. RUDOFSKY, ESQ.
Assistant U.S. Attorney

THE COURT: Kahane v. United States of America.

The Court has received a remand from the United States Court of Appeal of the Second Circuit. The Government made a motion for a summary reversal for lack of jurisdiction in alternative for a stay of determination of an appeal. That motion was denied. The Court, however, remanded to the U.S. District Court, Eastern District of New York, for consideration in the light of this Court's decision in United States v. Hus and Smilow decided July 25, 1975.

The Court is very grateful for the promptness with which counsel both attended. The Court shares the view of counsel for both sides that this matter should be promptly determined and it appreciates that that is a motive which led to the Government's motion for a summary disposition. I don't share the view; that the case should be decided promptly we all share the view.

This Court ordered kosher food to be supplied to the defendant and ordered that defendant be promptly sent to whatever institution the correction authorities thought he would serve his full term. Upon the refusal of the correction authorities and the United States to comply with this Court order, and

also to supply kosher food to the defendant, it was necessary to permit the defendant to buy his own kosher food under arrangements made by the New York Community Treatment Center.

Now, we have all read and studied this fine opinion, United States v. Hus and Smilow. In considering this argument, I think that counsel should first consider the following provisions of the Federal Rules of Civil Procedure and the Code, 28 United States Code. I'll advert to that after a motion is made by the Plaintiff.

The rules are 215; 21; 54(c); 81(a)(2); and Federal Rules of Civil Procedure; and 28 United States Code Section 1653. This is in fact the hearing, as I understand it, pursuant to 75(c) 624, the pending civil action in this Court.

Now, in accordance with the opinion of the Court of Appeals, I suggest that the Petitioner, Mr. Kahane, my first wish is to move to style himself as a Plaintiff-Petitioner.

Do you so move?

MR. SLOTNICK: We so move.

THE COURT: Any objection?

MR. RUDOFSKY: The only objection we would have to that, your Honor ought to be sure at the outset we

all understand that Mr. Kahane has filed a new civil action in this Court seeking 1361 relief, and it may well be the filing of this action in light of Hus and Smilow might moot further proceedings in the pending action.

THE COURT: I am not going to consider any other action. I am holding a hearing in 75-C-624; that motion is granted.

Second, that the defendant be styled, defendant-respondent, and shall include David G. Trager, United States Attorney for the Eastern District of New York; Norman Carlson, Director of the Federal Bureau of Prisons; Lawrence Taylor, Warden of the New York Metropolitan Correctional Center; and Matthew Walsh, Director of the New York Community Treatment Center.

MR. SLOTNICK: We so move, your Honor.

THE COURT: Any objection?

MR. RUDOFSKY: At least as to Mr. Trager, who has no duty to provide this defendant with food under any circumstances, and with respect to Mr. Walsh, whose facility does not provide any prisoner who is housed there with food, that's been amply noted in the record. At this time, I would neither consent nor reject with respect to Carlson or Taylor. If the Court is going to so order with respect to them, the Court

can do that, but certainly with respect to Mr. Trager and Walsh I don't see the basis for a duty owed by them to the defendant.

THE COURT: Motion is granted. The Petitioner may be able to establish, although I don't think it's particularly important for the purposesof this case after court orders were not promptly transmitted.

In addition, the Plaintiff-Petitioner was in this courthouse in custody of marshals and subject indirectly to the direction of the U.S. Attorney.

As to Mr. Walsh, the Petitioner-Plaintiff is in the custody of Mr. Walsh. He has, as I understand it, made orders, which permit Petitioner-Plaintiff to have kosher food outside the establishment. He is under the direct supervision of Mr. Taylor. He was under the direct supervision of Mr. Kengler and Mr. Taylor has taken Mr. Kengler's place, and Mr. Kengler did testify in this very case and was fully apprised of the facts, and undoubtedly gave directions to Mr. Walsh. We have also received communication from Mr. Walsh in connection with Petitioner-Plaintiff's incarceration. Motion to so amend is granted.

Third, it's suggested that the Petitioner-Plaintiff amend the claim for relief to include a

claim pursuant to 28 United States Code Section 2241(c)(3) on the grounds that he is in custody under "a condition of custody" Smilow at 5130 "in violation of the Constitution" of the United States, 28 USC Section 2041(c)(3).

MR. SLOTNICK: I make that application.

MR. RUDOFSKY: Your Honor, I think the Government's position with respect to this amendment is firstly that if 2241 case is to be heard in New York at all, it should more properly be heard in the Southern District. Your Honor has commented on that in the previous motion. It's not the Government's position, and furthermore, even more properly, a 2141 action should be brought in the district of ultimate confinement.

MR. SLOTNICK: We would object to that.

THE COURT: Excuse me Motion to amend is granted.

I suggest you move to amend the claim so that claim should include 28 USC 1361, on the grounds that the defendant failed to perform their constitutional and statutory duty towards the petition-plaintiff.

MR. SLOTNICK: I so amend, so move.

MR. RUDOFSKY: Again, your Honor, first of all the United States who I assume has not been removed

from the action as the named defendant was originally the only named defendant, has sovereign immunity as to 1361 claim, it can't be that kind of --

THE COURT: I take it it's only as to the individual named defendants.

MR. RUDOFSKY: And again, with respect to Mr. Trager, and also again with respect to Mr. Walsh, he does not have the facilities to supply food, kosher meals. I don't see the constitutional or statutory duty with respect to those two defendants.

THE COURT: These motions are granted pursuant to the following authority: 28 United States Code, Section 165(3) provides "that effective allegation of jurisdiction may be amended upon terms in the trial or appellate courts."

Rule 2 provides:

That there shall be "one form of action to be known as civil action." This means that any type of action, any claim for relief or any theory is encompassed under a pleading brought in a civil case.

Rule 15(b) provides: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may

be necessary to cause them to conform to the evidence and to raise these issues may be made uponmotion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues."

These issues were in fact tried, no objection was made. They should be deemed amended in any event and they are now explicitly amended.

Subdivision (c) relation back of amendment, provides that "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him."

In this case all of the named defendants had

full orders from the beginning, and their failure to bring them in as individual parties constituted

Rule 21 dealing with misjoinder and non-joinder of parties provides: "Parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

Rule 64(c) provides: "Except as to a party against whom a judgment is entered by default" not the case here. "Every final judgment shall grant the relief to which the party in whose favor it is rendered entitled even if the party has not demanded such relief in the pleadings."

And, of course, Rule 81(a)(2) provides that these rules are applicable proceedings in habeas corpus and also in other civil rights with respect to the writ generally.

In view of the Government's objection to venue, the Government will be deemed not to have waived the venue objection pursuantt0 28 USC Section 1046; and Rule 12(b) of the Rules of Civil Procedure. I shall heretofore hear argument on the issue of venue. It's in this Court's mind it has jurisdiction as the matter now stands, and I rely on the case of United States v. Huss and Smilow, as well as this Court's original

opinion from that. The issue comes down to the question of venue and I'll hear argument. I'll hear from the Government first since it's its motion that, as I understand, is before me.

MR. RUDOFSKY: With respect to venue, I would predicate my remarks. There is no doubt in my mind that under 28 USC 1391(e)(4), I believe this Court technically has venue. I wouldn't trifle with the Court to suggest otherwise; the prisoner resided in this district prior to his incarceration and the cases so hold. For purposes of the statute that constitutes venue.

As your Honor is aware, venue is a very flexible concept and it's predicated on the ideas of practicality. I think it's predicated on the idea of doing justice. The Second Circuit in Huss and Smilow although it didn't clearly say so, it came down strongly inherent in the opinion on the side of having questions such as that before your Honor, litigated in the district court, and perhaps in the circuit court, having jurisdiction over the ultimate place of confinement. I am aware of the fact that at least until the present, your Honor has not shared that view but it's the view that the Government takes. I think it's the view that the Second Circuit took in Huss and

Smilow. I would suggest therefore that at the very least the Court would consider transferring the case on the record made, with your Honor's views certainly on the constitutional questions, certainly well representative under the order that was previously appealed from to the district where Petitioner will be confined.

THE COURT: We don't even know that.

MR. RUDOFSKY: My understanding, I'll represent to the Court, subject to change immediately after the argument, he is going to be moved to Allenwood. It would be the appropriate district, and I would suggest that the entire concept underlying the mandamus of venue act of 1962 was to have that kind of decision with respect to duty owed to someone made in the district in which the duty is owed. That was the reason for making it possible for people living out of Washington, D.C. to bring actions presumably. This was not passed just for prisoners. We are talking about the citizens in general, normal course of events, in which the cause of action arises -- subdivision 2 of 1391(e) and it's reasonable, and I think it's good judicial practice for the case to be brought in the district where the duty is owed for the Court in that district to make the determination.

The record will be before the Court, the conditions -- realistic and actual conditions will be before the Court, not in a hypothetical sense, as to what the natural policy of the bureau is, and what accommodation it holds it could get; and I don't think the work that went on in this case, in this district, would be lost. I don't think your Honor's opinion -- certainly has never been reversed -- that a Court sitting in appropriate district, and I use appropriate not in a strict sense but what I believe to be more rational sense, could make a determination giving the actual conditions of incarceration and in view of your Honor's very, very scholarly opinion with respect to the constitutional questions, and the opinion of other courts that may bear on the matter.

I know, as I said before, your Honor feels strongly, perhaps as to this day --

THE COURT: I don't feel strongly about anything. I just deliver the law as I understand it. I am completely indifferent to the decision and result in any case.

MR. RUDOFSKY: With all due respect, if your Honor does in fact feel that he is completely indifferent here, it would be especially most appropriate, I think, the fundamental assumption that

any district court in this country will do justice, given a full record and given the opportunity to do so but there is no reason why a person who feels he is owed a duty, and let us assume for the purpose of this argument, the duty is owed in Allenwood, Pennsylvania.

THE COURT: The duty is owed. We follow your argument in the Southern District of New York.

MR. RUDOFSKY: At the present time, in conformity with your Honor's previous instructions, as I understand it, Rabbi Kahane has been receiving kosher food at the Community Treatment Center in the sense that he is able to obtain it at the local restaurant in the same way that all the other prisoners are able to obtain their food at all the other local restaurants. In the Southern District of New York, I don't think the duty to him, he claims, he acknowledges, is being violated.

I further don't think, with respect to the merits, that the duty would be violated even at Allenwood. I could accept, and I represent to the Court that he would not be given kosher meat; he would not be given kosher chicken. I represent to the Court he would be provided with a nutritionally adequate diet that would be acceptable, according to his religious tenets and with sufficient vitamin, mineral

supplements so his health would not be placed in jeopardy.

In summary, while I don't question the fact that the Court technically can hold that it has venue; technically, I think it would be in the interest of justice and in the interest of sound judicial administration and prison administration for this question, and questions like this, that might arise in the future to be litigated in the District of incarceration, where I think Petitioner will certainly get a full and fair hearing, either under 28 USC 1361, or 28 USC 1343, Subdivision (3); I believe the Court of Appeals suggested, or any other applicable statute. So I would respect urge the Court to decline to entertain the suit at this juncture and to, at the very least, transfer it, and as I say, for purposes of argument, assume the district to be the district which encompasses Allenwood, Pennsylvania.

THE COURT: The Court finds that Mr. Kahane is a resident of Brooklyn, as the Government concedes, and since this was his last place of permanent residence in the United States, both prior to his conviction and prior to his leaving the country; in addition, the defendant Trager resides in the Eastern District of New York. In addition, all the major

events in the case occurred in the Eastern District of New York. There is without a doubt, therefore, as the Government concedes, venue under 28 USC Section 1402, Subdivision (a); 1391, Subdivision (b); and 1391 Subdivision (e). Under the circumstances, even had this action been brought in the Southern District of New York or in the middle district of Pennsylvania, it would certainly, I think, have warranted transfer to this Court pursuant to 28 USC Section 1404.

The major issue, as the Court sees it in the case is the religious sincerity of Mr. Kahane, because following the Court's reasoning, if he is in fact sincere about these matters he will be compelled to forego food to the point of serious danger to his life. This Court since it's observed the defendant in the criminal case, the Petitioner-Plaintiff in this case, on many occasions has held extensive hearings and has tried this issue, it is clearly in the best position of any district court in the country to see the critical problem involved. If I were to transfer it to another court at this time, it would mean a duplication of all the work that this Court has done to date, and that would serve no purpose. It would mean that the case would not be heard until after the Petitioner-Plaintiff either was in a condition where

he had to be released because of physical problems, or where he would be released because his sentence was completed. It delays the Government in denying kosher food that the Court ordered; has used up almost all of the sentence the man has.

I believe reading the opinion of the Second Circuit, that the Second Circuit was interested in a case that presented the issues absentially and judicial problems. I believe that that's why they remanded it to this Court; and I believe, therefore, that the matter ought to be taken up to the Second Circuit again as quickly as possible so that we could get a decision on the merits, absent these problems which I believe do not exist in this case, although they may have existed in Huss and Smilow.

You say you brought another action?

MR. SLOTNICK: Most respectfully.

THE COURT: Let me see it.

MR. SLOTNICK: It has been referred to as 75-C-1334. We also have present before the Court a writ of habeas corpus that proper venue is in the Eastern District of New York.

THE COURT: Where is the writ?

MR. SLOTNICK: It has not been filed. We would ask your Honor to sign the order to show cause based

upon the writ.

THE COURT: Make it returnable at 4:00 o'clock today, because everybody is here. This will be filed forthwith. Make a motion to consolidate 75-C-1334.

MR. SLOTNICK: I would at this time make this application before your Honor.

THE COURT: And the habeas corpus which presently does not have a number with 75-C-624.

MR. SLOTNICK: I would ask that be consolidated, and they all be heard under Docket No. 75-C-624.

THE COURT: Motion to consolidate is granted. The complaint in 75-C-624 is deemed amended to include the allegations in the writ of habeas corpus petition and in 75-C-1334. In view of the fact that under the circumstances 75-C-1334, and petition for the writ of habeas corpus, it duplicates an action presently pending which has pended for some time. Motion to dismiss those actions will be granted upon motion of the Government.

MR. RUDOFSKY: Government so moves.

THE COURT: Granted. File this petition for habeas corpus, pay your fee, and then the Clerk will mark it dismissed.

Now, what else do we have to do today?

MR. SLOTNICK: We have an order with regard to

the provision for kosher food. In arguing the matter before the Court of Appeals they may or may not have been aware of the fact that Messrs. Huss and Smilow were paroled, and therefore this was moot. It was asked for a remand by the now Plaintiff-Petitioner. We asked the Court of Appeals to remand it back to your Honor so we could clear up any further problems of jurisdiction. I believe we have and we would ask your Honor to continue this order and decision.

THE COURT: Order and decision is continued. If you think I ought to write an opinion I will. I think I have covered it. Orally I could expand on it and give you a variety of cases, if you wish. As a general rule, the courts of the United States, particularly the federal courts, have not been niggardly in their interpretation of jurisdiction of venue, and a serious claim has been made that the constitutional rights of a defendant are involved. Had this plaintiff-petitioner been incarcerated in a state prison, even though that prison was in the Southern District of New York, and even though he had been in another district, the Court here could have entertained the petition pursuant to 28 United States Code Section 2241, Subdivision (d). There is as counsel is aware, a series of cases which were decided

in a variety of district courts, and in some of the Court of Appeals including this district court, involving problems of actions against parole authorities where the sentencing court felt that its decisionshad not been followed by the Parole Board, and even though defendant was incarcerated in another district, the Court which did the sentencing had entertained jurisdiction in order to protect their own power to sentence problem. I could advert to that whole line of cases but I will not do so since I don't think there is any serious question here about venue and jurisdiction. I don't really think it's necessary, therefore, to file a separate opinion. I think the Court of Appeals has a thorough grasp of the views of the Court below based upon Huss and Smilow, and this oral opinion will give counsel an opportunity to brief it. Submit an order by Monday.

Why doesn't counsel wait until they get the transcript which should be Tuesday? I think there should be no problem of your agreeing to the form of the order, and I appreciate your doing that, it being understood that the Government is cooperating with the Court below and the Court above, that it does not constitute any waiver of all of the objections and that it is properly raised at this time. Anything

further?

MR. RUDOFSKY: The only questions that I would direct to your Honor are, your Honor could advise the Government if it continues to maintain Plaintiff-Petitioner in conformity with the status quo, that he is released to eat at whatever restaurant he chooses to eat at in or about the treatment center; and the time considerations and the other physical time problems. If your Honor considers that in conformity with the outstanding order we certainly have no --

THE COURT: This Court has made it clear repeatedly what it desires and what it has ordered is that defendant -- I'll now move to the criminal characterization -- be incarcerated the same as anybody else and treated the same as anybody else including treatment which the Court says is required, if he is to have the freedom of his religious beliefs that's guaranteed by the Constitution.

The Court's desire was that he be incarcerated in a place where he was to serve his term. I understand that was to be Allenwood. The Court saw no reason why he shouldn't be immediately removed to Allenwood and supplied with kosher food. The Court found there would be no problem in providing kosher food. There is a whole series of organizations that

would supply it free of charge.

Now, if the Government wants to see that he gets his kosher food in any institution, that's up to the Government. He should stay in an institution. If you want to keep him at the Community Treatment Center and supply him with kosher food by bringing it in or doing anything else, that's up to you. If you want to send him to Allenwood, do that; if you want to keep him at the Community Treatment Center you could do that, but he can't be permitted to starve. He has only been released because the Government refuses to supply him with kosher food. I think my order is clear. I don't think there is any hallucination. How long you let him out and for what purposes, I am not telling you to let him out a certain number of hours. That's not my function. I have sentenced him, he's in the hands of Correction, and I have no desire to tell Correction what to do with him. Let him out or not let him out. While they have custody of him, they have to supply him with kosher food or permit him to get that kosher food, very simple proposition. I think the sooner the Court of Appeals and perhaps the Supreme Court tells us what the law is on this the better. I am sure you want that too.

Anything further?

MR. SLOTNICK: Not from me, Petitioner-Plaintiff or defendant.

THE COURT: The writ is satisfied.

(Whereupon, the Court stood in recess in this matter.)

* * *

SA24

ADDRESS REPLY TO
UNITED STATES ATTORNEY
AND REFER TO
INITIALS AND NUMBER

CIS:ESR:iq
F.#750509

United States Department of Justice

UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK
FEDERAL BUILDING
BROOKLYN, N. Y. 11201

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

★ AUG 20 1975 ★

TIME A.M.
P.M.

August 20, 1975

Honorable Jack B. Weinstein
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Kahane v. United States of America,
et al. - Civil Action No. 75 C 624

Dear Judge Weinstein:

We are writing to you at this time for the purpose of withdrawing the concession offered during the course of the hearing held herein on August 14, 1975 to the effect that venue lies in this judicial district by virtue of 28 U.S.C. §1391(e)(4) on the theory that plaintiff-petitioner resided (i.e., was domiciled) in this district immediately prior to incarceration. (Transcript of August 14, 1975, at p. 11.)

A review of our files indicates that, while plaintiff-petitioner resided in this district prior to his original sentencing in 71 CR 479, his residence immediately prior to incarceration for violation of probation was - for venue purposes - the State of Israel. (Your Honor will recall that the Kahane family moved to Israel after the Court imposed the original, suspended, sentence.) Thus, we do not believe and cannot concede that plaintiff-petitioner was, for purposes of §1391, a resident of this district immediately prior to incarceration.

Accordingly, we respectfully request that the Court direct the Clerk to file this letter as a part of the record herein for the purpose of withdrawing

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SA 25

Honorable Jack B. Weinstein
United States District Judge
Eastern District of New York

August 20, 1975

the aforementioned concession, and that the Court, before entering any order on remand, reconsider its rulings on jurisdiction and venue in light of the foregoing.

Very truly yours,

DAVID G. TRAGER
United States Attorney

By: Edward S. Rudofsky
EDWARD S. RUDOFSKY
Assistant U.S. Attorney

cc:

Barry I. Slotnick, Esq.
233 Broadway
New York, New York 10007

The government will be permitted to withdraw its concession. For purposes of venue, Brooklyn is the defendant's residence. This was his last place of residence in this country. All his roots were here -- he was brought up in Brooklyn and lived here as an adult. In addition, he was on probation, subject to the probation service operated in Brooklyn, and this court's supervision, even while he was abroad. He was in Israel only because this court permitted him to be there. Upon his return, he had to report for supervision and justification of his conduct abroad to this court, in Brooklyn. The court reaffirms its decision. The clerk will send a copy of this memorandum and order to counsel. So ordered. -2-

Jack B. Weinstein

August 20, 1975.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

MEIR KAHANE,

Plaintiff,

75C 1334

-against-

COMPLAINT

NORMAN CARLSON, Director, Bureau of Prisons and MATTHEW WALSH, Complex Director, Federal Community Treatment Center ("CTC"),

75 C.
J.B.W.

Defendants.
----------X

Plaintiff, complaining of the defendants, by his attorney, BARRY IVAN SLOTNICK, alleges as follows:

1. That the defendant NORMAN CARLSON, was and still is the Director of the Bureau of Prisons for the United States of America.

2. That the defendant, MATTHEW WALSH, was and still is the Complex Director of the Federal Community Treatment Center ("CTC") at New York City, New York.

3. That in these capacities the defendants are the custodians of the plaintiff, a prisoner at CTC.

4. That prior to his incarceration, the plaintiff resided at 1814 East Second Street, Brooklyn, New York.

5. That the action herein is one for mandamus to issue against the defendants, with jurisdiction lying within this Court under 28 USC §1361.

6. That venue in this District is founded upon 28 USC §1391(e)(4) as plaintiff resided in this District prior to incarceration. Kahane v. U.S., -F.Supp.-, 75-C-624 (71-CR-479),

(5/7/75, E.D.N.Y.).

7. On March 17, 1975, this Court issued an "Amended Commitment, Violation of Probation" which sentenced plaintiff to one (1) year of incarceration.

8. The defendants have refused to provide plaintiff, an Orthodox Jewish Rabbi, with Kosher food, as his religion mandates. The foregoing is in violation of plaintiff's First Amendment rights.

9. Defendants have further refused to allow plaintiff access to a quorom of ten (10) Orthodox Jewish co-religionists (minyan) as is required by his religion for prayer and worship. The foregoing is in violation of plaintiff's First Amendment rights.

10. That the defendants have in these matters acted in violation of the rights and protections accorded the plaintiff under the First and Eighth Amendments to the Constitution of the United States of America.

WHEREFORE, plaintiff demands that a writ of mandamus issue from this Court requiring the defendants, and each of them, to provide plaintiff with Kosher food during the period of his incarceration, and additionally, that plaintiff be accorded access to a minyan, together with the costs and disbursements of this action.

Dated: New York, New York
August 14, 1975

BARRY IVAN SLOTNICK
Attorney for Plaintiff
233 Broadway
Forty-Fourth Floor
New York, New York 10007
(212) WO 4-3200

UNITED STATES DISTRICT COURT
~~SOUTHERN~~ EASTERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA, EX REL.
MEIR KAHANE,

Relator,

PETITION FOR WRIT OF HABEAS CORPUS

- against -

United States Marshall for the Eastern District of New York and,
MATTHEW WALSH, COMPLEX DIRECTOR,
COMMUNITY TREATMENT CENTER ("CTC")

Respondent.

TO THE HONORABLE UNITED STATES DISTRICT COURT FOR THE ~~SOUTHERN~~ EASTERN DISTRICT OF NEW YORK:

The petition of BARRY IVAN SLOTNICK, respectfully shows:

1. That your petitioner is an Attorney at Law of the State of New York, and is the attorney for MEIR KAHANE, Relator herein, and is fully familiar with all the facts and circumstances in connection herewith. That your petitioner makes application herein a Writ of Habeas Corpus for his client, MEIR KAHANE, by reason of the fact that said MEIR KAHANE is unlawfully detained and restrained of his liberty by the respondent, COMPLEX DIRECTOR OF THE COMMUNITY TREATMENT CENTER, New York City, New York, the said Center being a Penal Institution under the jurisdiction of the Bureau of Prisons.

2. The Relator is now in the custody of the ~~Complex Director~~ United States Marshall for the Eastern District of ~~of said Community Treatment Center, New York City~~, New York, which ~~(prison)~~ is in the territorial jurisdiction of this Court.

3. The cause or pretext of said detention and restraint is a certain plea of guilty taken in the District Court, Eastern District of New York, before Weinstein, J., on July 9, 1971 to a charge of conspiracy to make, receive and possess incendary devices.

4. On July 23, 1971, the Relator was sentenced to five (5) years of imprisonment, said sentence suspended, and fined $5,000.00. Relator was placed on five (5) years probation.

5. On May 15, 1972 an Order was filed adjudicating the Relator in violation of probation, said Order having been delivered after a hearing held on May 2, 1972. The Order added special conditions of probation and continued said probation.

6. On February 21, 1975 the Relator was found to have violated probation. Probation was revoked and a one (1) year term of imprisonment was imposed.

7. On May 7, 1975 an Order was filed requiring the Bureau of Prisons to insure that no religious rights of the Relator, an orthodox Jewish Rabbi, be trod upon. Said Order was amplified by a second Order, dated April 4, 1975 which, after refusal by the Bureau of Prisons, transmitted by the United States Attorney, to hold the religious freedom of the Relator inviolate, caused the Court to require that, until such time as the authorities could make such guarantees, the Relator be held at his present place of incarceration, and he there be allowed such freedom as is necessary to eat kosher meals and participate in orthodox Jewish religious services.

8. In both word and deed it has become obvious that the government and the respondent will continue in the paths they have chosen early in this matter, to wit, to deny to the Relator the most elementary requirements of his faith, viz. kosher food and the availability of his co-religioners for the purposes of prayer.

9. The said detention is, therefore, unlawful and unconstitutional, in that the Relator is entitled to the sanctity and the practice of his religion. The Constitution, the material interpertating that most noble charter, and the entire history of government and its relationship to religious liberty indicate that the Relator is being incarcerated under conditions antithetical to his rights and liberties.

10. The issues presented on this application are, whether, under the guarantees afforded to the Relator by the Constitution of the United States, Relator was and is being deprived of his liberty without due process of law, in a manner in violation of the guarantees of equal protection, to all men, under the law, and in a form repugnant to the Bill of Rights.

11. That all of the facts heretofore asserted may be before the Court on this application and the record on appeal to the United States Court of Appeals, Second Circuit (75-2008 - 75-1275) (joint appendix) containing verification of all of the aforesaid statements is hereby made a part of this petition with the same force and effect as if fully incorporated herein. A copy of said record will be submitted to the Court.

12. In order that further facts in behalf of the Relator in this application may be presented to this Court, it is respectfully urged that the Court set a date for hearing, and that the Relator's presence be required at said hearing in order that he may testify to the factual matters necessary for proper adjudication.

13. Due to the nature of the irreparable harm and bodily damage which will be caused by the necessary abstinence of the Relator from normal and nutritious foods during his current period of incarceration and pending determination of this writ, it would be most respectfully requested of this Court that this Court release the defendant pending determination of the matter herein either in the custody of counsel or upon equitable bail. This Court may act in the interests of justice in this matter.

14. No other application for this relief has heretofore been made to any Court or judge other than an application under 28 U.S.C. 2255, on May 7, 1975.*

WHEREFORE, petitioner prays that a Writ of Habeas Corpus issue herein directed to the said United States Marshall, Eastern District, MATTHEW WALSH, as Complex Director of the Community Treatment Center, New York City, New York, commanding him to produce the body of the Relator MEIR KAHANE, before this Court at a time and place to be specified in said writ, to the end that this Court may inquire into the cause of the Relator's detention, and that the Relator be ordered

discharged from the detention and restraint aforesaid.

BARRY IVAN SLOTNICK
Attorney for Relator
233 Broadway
44th Floor
New York City, N.Y. 10007
233-5390

VERIFICATION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Personally appeared before me, BARRY IVAN SLOTNICK, who, after being duly sworn, says and deposes that the facts and things alleged in the foregoing petition are true, to the best of his knowledge, upon information and belief.

BARRY IVAN SLOTNICK

Sworn to and subscribed
before me this day of
August, 1975.

NOTARY PUBLIC
STATE OF NEW YORK

JAY L. T. BREAKSTONE
Notary Public State of New York
No. 4525589
Qualified in Nassau County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

MEIR KAHANE,

Plaintiff-Petitioner,

-against

NORMAN CARLSON, Director of the Federal Bureau of Prisons, LAWRENCE TAYLOR, Warden of the New York Metropolitan Correction Center, and MATTHEW WALSH, Director of the New York Community Treatment Center,

Defendants-Respondents.

----------x

75-C-624

United States Courthouse
Brooklyn, New York

August 21, 1975
3:00 o'clock p.m.

B e f o r e :

HONORABLE JACK B. WEINSTEIN, U.S.D.J.

WINFRED LEWIS
ACTING OFFICIAL COURT REPORTER

Appearances:

BARRY SLOTNICK, ESQ.
Attorney for Plaintiff-Petitioner

DAVID G. TRAGER, ESQ
United States Attorney
for the Eastern District of New York

BY: EDWARD S. RUDOFSKY, ESQ.
Assistant U.S. Attorney

THE COURT: I've received a proposed order from the Government which I have marked up with interlineations and have had Xeroxed and distributed to counsel.

Mark that as an exhibit, please.

THE CLERK: Court Exhibit 1.

THE COURT: Have you had a chance to look at it?

MR. RUDOFSKY: Yes, we have.

THE COURT: Any objections to it?

MR. RUDOFSKY: Certainly not for the purposes of entering an order. I do have objections to some of the things that are in it in the sense that we reserve them.

THE COURT: Yes, that's all I wanted.

MR. SLOTNICK: I have no objection.

THE COURT: All right, then will the Government have it typed, and I'll sign it.

MR. RUDOFSKY: Yes, we will, your Honor.

THE COURT: Take the original and then file it. Your typist will find it easier.

MR. SLOTNICK: Your Honor, rather rapidly before your Honor is to sign the order I would make the following applications with regard to this matter, to perhaps clarify the record. As your Honor said so well on August 14, 1975, the basic concern of the Court should

be the substantive issue herein and we should all be rushing to judgment, to determine whether your Honor was correct or incorrect with regard to the law in regard to the so-called "kosher food" issue, we would find, your Honor, that the Government is as anxious as we are to determine this issue.

However, I am rather troubled by the Government's request of August 20th of 1975 where it asks your Honor to reconsider its rulings on jurisdiction and venue. I have spoken to Mr. Rudofsky, and I believe we have come to the following understanding, which for the purpose of the record may aid whatever court may intend to look at this matter.

No. 1, we would consent to having the United States of America dropped as a defendant.

THE COURT: Well, I've taken the United States out in that proposed order, you know.

MR. SLOTNICK: I noticed that, your Honor.

No. 2, Mr. Rudofsky has indicated to me that there is no question but that his office does represent Norman Carlson, Lawrence Taylor and Matthew Walsh, so that his question of jurisdiction is not jurisdiction over the parties but jurisdiction over the subject matter, which your Honor has determined.

With regard to that, we have received your Honor's

ruling and await the ruling of the Court of Appeals, and perhaps the United States Supreme Court. I think that narrows the issue there.

With regard to venue, I will repeat and reiterate, No. 1, a writ of habeas corpus was signed and directed against the United States Marshal for the Eastern District of New York at a time when the plaintiff-petitioner, Rabbi Kahane, was present in the Eastern District in custody of said marshal.

Secondly, venue, as your Honor had indicated in his prior ruling, is predicated on the fact that Rabbi Kahane resided in the Eastern District immediately prior to his parole violation hearing, and the statute specifically says, "residence," not domicile.

And further, as your Honor indicated on August 14, 1975, this would be the proper forum in view of the fact that all of the facts and circumstances occurred within this District.

However, I would specifically indicate to the Court that the plaintiff-petitioner did in fact reside in the Eastern District of New York prior to his original sentencing and prior to the Court re-taking jurisdiction over him with regard to the probation revocation hearing. Therefore, venue is proper.

MR. RUDOFSKY: Just for the purposes of the

record, your Honor, the Court would not have personal jurisdiction over the remaining defendants-respondents unless venue is proper under 1391, because the extra-territorial service is inextricably tied up with proper venue under 1391, and as your Honor is aware, our position is that the cause of action to the extent that it ever arises or has arisen has not done so in the Eastern District, and if we are correct on the question of domicile there would be no personal jurisdiction over the defendants.

But that is again a question of mandamus jurisdiction that is tied up with venue. I think those questions will of necessity be addressed together, and I take it by your Honor indicating that he wants the order presented to him as marked up subsequent to receipt of our letter that your decision stands with respect to venue and jurisdiction.

THE COURT: Yes, my decision stands, but of course the Government's withdrawal of its concession is permitted.

MR. RUDOFSKY: And I would just --

THE COURT: In your letter I endorsed an order and I sent it down to the Clerk, indicating additional reasons why I thought that the defendant had to be considered a resident of this district.

MR. RUDOFSKY: And I would also note just for the

record -- this is hardly the time to go into the details of it -- that our position on the writ of habeas corpus question is that the Court cannot get habeas jurisdiction over a person, prisoner, when that prisoner is brought to the Court from another district on a writ of habeas corpus ad prosequendam or ad testificandum, whichever it was in this case, and then serve the marshal at that point and then proclaim the prisoner to be in confinement in that district.

THE COURT: Yes, I think that's probably so, and I didn't base my jurisdictional claim on the fact that he happened to be in the Eastern District pursuant to my writ. He was writted over here only in case he was needed as a witness.

MR. RUDOFSKY: And with that in mind we again have no objection to the form of the order.

THE COURT: All right, get it out, and let's get the case moving up if we can.

Thank you, gentlemen.

MR. SLOTNICK: We would also indicate, your Honor, for the purpose of the record, that on behalf of the Plaintiff-Petitioner we would consent to the expedition of the appeal in this matter if the Government decides to appeal.

THE COURT: I have nothing to do with that. Thank you.

***

CIS:ESR:ec

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MEIR KAHANE,

Plaintiff-Petitioner,

- against -

NORMAN CARLSON, Director of the Federal Bureau of Prisons, LAWRENCE TAYLOR, Warden of the New York Metropolitan Correctional Center, and MATTHEW WALSH, Director of the New York Community Treatment Center,

Defendants-Respondents.

----------X

ORDER ON REMAND

Civil Action
No. 75 C 624

This case having been remanded by the United States Court of Appeals for the Second Circuit for consideration

in light of the decision of that Court in United States v. Huss and Smilow, ____ F.2d ____, Slip Op. 5121 (2d Cir., July 25, 1975), and the parties having furnished this Court with copies of the appellant's brief on appeal, its motion for summary reversal (or, in the alternative, for a stay pending appeal) and the supporting and opposing papers on the motion, and counsel having appeared and orally argued before this Court on August 14, 1975 and on August 21, 1975, and this Court having considered the aforementioned decision of the Court of Appeals and the arguments both for and against the proposition that this Court has jurisdiction in the instant proceedings, and motions for the said relief having been duly made, it is hereby ORDERED, ADJUDGED and DECREED as follows:

(1) Meir Kahane shall hereinafter be referred to as the "plaintiff-petitioner" throughout these proceedings;

(2) The defendants-respondents shall hereinafter be deemed to be Norman Carlson, Director of the Federal Bureau of Prisons, Lawrence Taylor, Warden of the New York Metropolitan Correctional Center, and Matthew Walsh, Director of the New York Community Treatment Center;

(3) Plaintiff-petitioner's prior application to this Court pursuant to 28 U.S.C. §2255 shall be, and the same is, deemed amended to include a claim for relief against the defendants-respondents pursuant to 22 U.S.C. §2241(c)(3) on the ground that plaintiff is in custody under a condition of custody in violation of the Constitution of the United States;

(4) Plaintiff-petitioner's prior application to this Court pursuant to 28 U.S.C. §2255 shall be, and the same is, deemed further amended to include a claim for relief against the individual defendants-respondents pursuant to 28 U.S.C.

§1361 on the ground that the said defendants-respondents failed to perform their constitutional and statutory duty towards the plaintiff-petitioner;

(5) The pleadings having been amended as aforesaid pursuant to 28 U.S.C. §1653 and Rules 2, 15(b), 15(c), 21, 54(c) and 81(a)(2) of the Federal Rules of Civil Procedure, and the Court concluding that it accordingly has jurisdiction over the subject matter and parties notwithstanding the objections heretofore raised by the Government, and that venue in this district is proper, the defendants-respondents' motion for a transfer of this cause to a judicial district wherein the plaintiff-petitioner is or will be incarcerated shall be, and the same is, denied;

(6) The Court having been advised that plaintiff-petitioner has begun a separate action in this district pursuant to 28 U.S.C. §1361 against Norman Carlson,

Director of the Federal Bureau of Prisons, and Matthew Walsh, Director of the New York Community Treatment Center, which action has been docketed by the Clerk of the Court as Civil Action No. 75 C 1334, and the Court having been further advised that plaintiff-petitioner seeks a writ of habeas corpus herein pursuant to 28 U.S.C. §2241 by way of a petition styled United States ex rel. Meir Kahane v. U.S. Marshal, Eastern District of New York and Matthew Walsh, Director, Community Treatment Center, which petition has been docketed by the Clerk of the Court as Civil Action No. 75 C 1343, and the plaintiff-petitioner having moved to consolidate the two said actions with Civil Action No. 75 C 624, and the defendants-respondents having moved to dismiss the said actions, the complaint in Civil Action No. 75 C 624 shall be, and the same is, deemed amended to include the complaint in Civil Action No. 75 C 1334 and

the petition in Civil Action No. 1343. The said complaint in Civil Action No. 75 C 1334 and petition in Civil Action No. 75 C 1343 shall be, and the same are, dismissed on the ground that they now duplicate the claims in Civil Action No. 75 C 624 as amended, which has been pending before this Court for some time;

(7) The Decision and Order of this Court dated May 7, 1975 and the oral findings of the Court on August 14, 1975 and August 21, 1975, and all orders subsequent to the remand and prior to the first appeal in this cause, shall be, and the same are, continued in full force and effect, and are reaffirmed as to the amended complaint, and, furthermore, all testimony heretofore taken is deemed to have been taken in the cause as it now stands;

(8) The defendants-respondents shall not be deemed

to have waived either their objections to jurisdiction or venue.

Dated: Brooklyn, New York
August 21, 1975

s/ Jack B. Weinstein
UNITED STATES DISTRICT JUDGE

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 22nd day of September, 1975, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a APPELLANT'S SUPPLEMENTAL BRIEF & APPENDIX of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Barry Ivan Slotnick, Esq.
233 Broadway, 44th Floor
New York, N.Y. 10007

Evelyn Cohen

Sworn to before me this
22nd day of Sept. 1975

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

KE NOTICE that the within
ed for settlement and signa-
rk of the United States Dis-
his office at the U. S. Court-
dman Plaza East, Brooklyn,
he ____ day of _____,
30 o'clock in the forenoon.

n, New York,
_____, 19____

_____
States Attorney,
ey for _____

_____
_____
_____
_____

KE NOTICE that the within
of _____duly entered
___ day of _____
_, in the office of the Clerk of
ct Court for the Eastern Dis-
ork,
n, New York,
_____, 19____
_____
States Attorney,
ey for _____

_____
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_____
r _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____
_____is hereby admitted.
Dated: _____, 19____

_____
Attorney for _____

FPI-LC-5M-8-73-7355